No. (1)

Supreme Court, U.S.
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In The

Supreme Court of the United States

ROBERT KEITH ADAMS.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner requests that this Court resolve a conflict among the Fourth Circuit and other Circuits and this Court concerning whether a prosecutor's attempts to convict based upon "guilt by association" violated petitioner's right to a fair trial under the Due Process clauses of the Fifth and Fourteenth Amendments to the United States Constitution, where the prosecutor repeatedly, over objection, offered evidence and told the jury that it should convict petitioner because 19 other persons had been convicted of other crimes.

PARTIES TO THE PROCEEDING

All parties to the proceeding in the court whose judgment is sought to be reviewed are included in the caption of the case.

Petitioner is an individual person and is not a nongovernmental corporation, and no corporate disclosure statement is therefore required pursuant to Rule 29.6 of the Rules of the United States Supreme Court.

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Adams v. United States, No. 08-4180 (4th Cir. 2009)(unpublished). (App. 1a-20a)

STATEMENT OF BASIS FOR JURISDICTION IN THIS COURT

The Fourth Circuit court of appeals entered the order upon which review is sought on June 29, 2009. Subsequently the Fourth Circuit denied petitioner's timely motion for rehearing and rehearing *en banc* by order dated August 4, 2009. The Fourth Circuit's decision is in conflict with decisions of this Court and the courts of appeals and violates the due process clauses of the Fifth and Fourteenth Amendments to the Constitution of the United States.

This petition for writ of *certiorari* has been filed less than 90 days from the order denying the motion for rehearing and rehearing *en banc* in accordance with Rule 13 of the Rules of the United States Supreme Court. This Court therefore has jurisdiction to review by petition for writ of *certiorari* pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. V:

> No person shall be held to answer for a capital, or otherwise infamous crime,

> unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. XIV:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> Section 2. Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not

taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

> Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.
>
> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

STATEMENT OF THE CASE

I. Basis of Federal Jurisdiction in the Court of First Instance.

The United States district court for the western district of Virginia had jurisdiction over this matter pursuant to 18 U.S.C. § 3231.

II. Facts Material to Consideration of the Question Presented.

Adams was charged in a six-count indictment with (1) accessory after the fact to cocaine distribution in violation 18 U.S.C. § 3, (2) misprision of a felony in violation of 18 U.S.C. § 4, (3)

obstruction of justice in violation of 18 U.S.C. § 1512(c)(2), (4) obstruction of justice in violation of 18 U.S.C. § 1505, and (5) and (6) two counts of giving a false statement to a federal agent in violation of 18 U.S.C. § 1001(a)(2). Count III was dismissed as multifarious by order entered February 28, 2007 (JA 95). Trial by jury commenced October 30, 2007 and ended November 2, 2007. The jury found Adams not guilty of Counts I, II and VI and guilty of Counts IV and V (obstruction and false statement). The Fourth Circuit reversed and vacated the conviction for obstruction of justice (Count IV) and affirmed the false statement conviction (Count V).

The trial of Robert Keith Adams, a former deputy employed by the Henry County Sheriff's Department, was an unbridled effort by the United States to convict Adams based on guilt by association. Throughout the trial the prosecutor told the jury that it should convict Adams because federal agents had "worked hard" and convicted 19 other persons of other crimes. The effort began during opening statement. There the prosecutor told the jury,

> This is Stan Slater, special agent with the Federal Bureau of Investigations. This is Special Agent Mark Austin with Virginia State Police. *These are two gentleman who did the fine job in the Henry County case that y'all been hearing about [Case No. 7:06cr00098],* that started the indictments last November; but the case they worked on started a couple of years before that, as

you'll find out during the course of this trial.

"Ladies and gentlemen, this is a case of a law enforcement nightmare. The Henry County Sheriff's Office, during the pendency of this investigation, it was common behavior for officers to turn a blind eye to the illegal activities of other officers. It was common behavior for officers to help other officers commit crimes. *It was a common behavior for the officers of the Henry County Sheriff's Office to take a piece of the pie, be it taking seized drugs to sell, be it stealing seized evidence out of the locker room—*

Mr. Grimes: Your Honor, objection; improper argument.

The Court: Well, this is an opening statement, and the Court has told the jury that the opening statements are not evidence. All of you understand that?

Jury Member: (Answers affirmatively.)

> The Court: Overrule the objection.

(JA 241-42) [Emphasis added]. [1]

The government went on, over objection, to describe activities of other officers in the Henry County Sheriff's Office that were unrelated to the charges against Adams (JA 244 – 47). For example, the indictment against Adams did not allege criminal conduct associated with James Vaught's rental house.[2] Nonetheless in its opening statement the government told the jury that Vaught allowed other officers to use his "rental house ... to conduct extramarital affairs during work hours," and that Vaught allowed Randy Reed – another defendant, to operate the rental house as a drug house (JA 246). No evidence at trial, however, showed that Robert Adams used Vaught's rental house for any purpose, illegal or otherwise; none of the illegal acts with which Adams was charged occurred at the rental house; nor was the house in any way involved in the case against Adams. In short Vaught's rental house had absolutely nothing to do with the offenses that Adams allegedly committed.

---

[1] Adams was never charged with "taking a piece of the pie," taking seized drugs to sell, or stealing seized evidence out of the locker room. He was charged with accessory after the fact to cocaine distribution and misprision of a felony. There was no evidence to support those charges, however, and the jury properly acquitted Adams of those charges.

[2] James Vaught, a former Henry County Sheriff's Deputy, was the primary informant for the government and the most prolific of violator of law among the persons indicted.

The United States called as its first witness FBI agent Stan Slater. Slater testified extensively over objection concerning his investigation into allegations involving the "racketeering of the Henry County Sheriff's Office" (JA 268-313).[3] Adams objected repeatedly on grounds of relevance, undue prejudice, and hearsay. Trial proceeded, however, as if the rules of evidence did not exist. For example, as Slater testified concerning alleged criminal activity that had nothing to do with Adams, counsel objected,

> Mr. Grimes: Your Honor, objection; lack of relevance and lack of personal knowledge.
>
> Mr. Bondurant: Your Honor, it only provides background. We've all talked about it in opening statements anyway.
>
> Mr. Grimes: It provides for prejudicial background. My client is charged with five discrete crimes. I would ask that the evidence be confined to those.
>
> The Court: All right. Overruled. You understand this is just background information. Go ahead.

(JA 269-70).

---

[3] Adams was not charged with racketeering.

. . .

Mr. Grimes: Same objection, Your Honor. This is hearsay.

The Court: Okay. You understand this is just general background. Go ahead.

(JA 271).

. . .

Q. Defense counsel also said that Eric Hairston was Adams' supervisor back in 2001. Did you review Eric Hairston's personnel file?

A. Yes, I did.

Q. Is that correct?

A. No, it's not.

Mr. Grimes: Your Honor, objection. The witness is saying, "Based upon my review of the personnel file, thus and such is the case." This is obviously hearsay.

The Court: *That is what he is telling the jury what the personnel file says. That is not hearsay.* Go ahead.

(JA 273-74) [Emphasis added].

. . .

A. What had happened was that there was a drug dealer named Rayfield Moore who we had heard for years was being protected by the sheriff's office. People from my agency, people from DEA, had tried to, unsuccessfully, for years—

Mr. Grimes: Your Honor, objection; hearsay.

Mr. Bondurant: Again, Your Honor, as background about why we went in, and not for the truth of the matter.

The Court: He can tell us what he did. Go ahead.

(JA 277).

. . .

Mr. Grimes: Objection; relevance. That has nothing to do with the five charges against my man.

Mr. Bondurant: Your Honor, it explains what led up to the interview of March 24th.

> The Court: He is telling why he had the interview. Overrule the objection.
>
> A. *Like I said, there was a lot of concern with the sheriff's department why DEA doesn't trust them.*

(JA 279)[Emphasis added].

The government continued, eliciting inadmissible testimony regarding other deputies allegedly involved in illegal activity:

> Q. Where is Brian Wimbush, if you know?
>
> A. I don't know. What I've *heard* is that he left the sheriff's office under some *suspicion of illegal activities* himself.
>
> Q. *He was considered to be a rogue cop, too; is that correct?*
>
> A. That's my understanding.

(JA 316-17, redirect examination of Slater)[Emphasis added]. This testimony was not offered to rebut any testimony offered by Wimbush; in fact, Wimbush was never called as a witness at trial.

> Q Did any *other officers*, Henry County sheriff's [sic] officers, use the house for extramarital affairs?
>
> A Yes.

(JA 334, direct examination of Vaught)[Emphasis added].

> Q ... [D]id you agree to wear a body recorder on other people *that you felt might be committing illegal activities?*
>
> A Yes.
>
> Q *And were most of these people involved in some way, either members of or associates of the Henry County Sheriff's Office?*
>
> A Yes.
>
> Q And approximately how many ... tape recordings did you engage in?
>
> A From approximately 98 to a little over a hundred recordings.
>
> Q *And this resulted in an indictment that came down last November?*
>
> A Yes.

(JA 339, direct examination of Vaught)[Emphasis added].

> Q And *the federal charges you pled guilty to* involve the Henry County Sheriff's Office case?
>
> A Yes.

(JA 430, direct examination of Wilbert Brown)[Emphasis added].

During closing, the prosecutor argued that the jury should convict Adams because of Adam's association with convicted persons:

> In the course of this whole investigation in Henry County, James Vaught did 80, 90, 100, some number of recordings, *which led to a great number of indictments and convictions*, as you've seen.

(JA 877-78) [Emphasis added]. Continuing, he argued:

> These two heroes [special agents Slater and Austin] worked extremely hard and *convicted 20 people on public – 19 people on public corruption charges. And Robert Adams happens to be right in the middle of it.*

(JA 880-81, rebuttal argument) [Emphasis added].

> *They're [the other codefendants] not getting off, they're not getting away, and neither should Robert Adams.*

(JA 890) [Emphasis added]. Although the evidence against Adams was marginal at best, the prosecutor's efforts to convict by association were successful; the jury convicted Adams of obstruction of justice (Count IV) and making a false statement to a federal agent (Count VI).

Citing no authority whatsoever, a panel of the Fourth Circuit nevertheless concluded in an unpublished, *per curiam* opinion that "the Government did not cross the line into impermissible assertions of guilt by association when it elicited brief, background information from Agent Slater as to his investigations of the [Henry County Sheriff's Department] and its witnesses regarding their participation in corrupt acts with which Adams was not charged" (Mem. Op. at 15).

ARGUMENT

THE FOURTH CIRCUIT ERRED BY HOLDING THAT THE PROSECUTOR'S EFFORTS TO CONVICT BASED UPON GUILT BY ASSOCIATION DID NOT CROSS THE LINE: THE PROSECUTOR'S ACTIONS VIOLATED PETITIONER'S RIGHT TO A FAIR TRIAL UNDER THE DUE PROCESS CLAUSES OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The panel's decision is at odds with Supreme Court and lower court precedent. In *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 178-79, 71 S. Ct. 624, 95 L. Ed. 817 (1951) (*Douglas concurrence*), the Supreme Court described the government's efforts to obtain convictions based upon guilt by association as "one of the most odious institutions of history,"

> The technique is one of guilt by association---one of the most odious institutions of history. The fact that the technique of guilt by association was used in the prosecutions at Nuremberg does not make it congenial to our constitutional scheme. Guilt under our system of government is personal. When we make guilt vicarious we borrow from systems alien to ours and ape our enemies. Those short-cuts may at times seem to serve noble aims; but we depreciate ourselves by indulging in

> them. When we deny even the most degraded person the rudiments of a fair trial, we endanger the liberties of everyone. We set a pattern of conduct that is dangerously expansive and is adaptable to the needs of any majority bent on suppressing opposition or dissension.

Id. at 178-79. *See also*, *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 920, 102 S. Ct. 3409, 73 L. Ed. 2d 1215 (1982) (holding that "liability may not be imposed merely because an individual belonged to a group, some members of which committed acts of violence"); *Healy v. James*, 408 U.S. 169, 186, 92 S. Ct. 2338, 33 L. Ed. 2d 266 (1972) (holding that "guilt by association" may not be imposed).

The United States' efforts here to secure Adams' conviction based upon the fact that 19 other persons were convicted of other crimes, though expedient, effectively denied Adams the due process secured by the Fifth and Fourteenth Amendments to the Constitution of the United States. In short, the United States effectively denied Adams a fair trial,

> Those short-cuts may at times seem to serve noble aims; but we depreciate ourselves by indulging in them. When we deny even the most degraded person the rudiments of a fair trial, we endanger the liberties of everyone.
>
> . . .

> It is procedure that spells much of the difference between rule by law and rule by whim or caprice. Steadfast adherence to strict procedural safeguards is our main assurance that there will be equal justice under law.

McGrath, 341 U.S. at 179.

Every lower appellate court has reached the same conclusion. In *United States v. Polasek*, 162 F.3d 878 (5th Cir. 1998), for example, the Fifth Circuit reversed a conviction because, just as in the case at bar, the prosecutor during closing "emphasized the fact that many of Polasek's former business associates had been convicted of [other crimes]." *Id.*, at 883. The defendant did not object and was convicted. On appeal the Fifth Circuit nevertheless reversed and held,

> It is well established in this circuit that the government may not attempt to prove a defendant's guilt by showing that she associates with "unsavory characters." *United States v. Singleterry*, 646 F.2d 1014, 1018 (5th Cir. Unit A June 1981) (finding plain error where the prosecutor asked the defendant whether he associated with felons)

Id., at 884. In a footnote, the Fifth Circuit gathered similar holdings from sister circuits,

Many of our sister circuits, however, have concluded that such evidence is irrelevant under Federal Rules of Evidence 401 and 402 or unduly prejudicial under Rule 403. *See United States v. Johnson*, 934 F.2d 936, 942-43 (8th Cir. 1991) (analyzing the defendant's guilt of association argument under Rules 401 and 403); *United States v. St. Michael's Credit Union*, 880 F.2d 579, 600-02 (1st Cir. 1989)(applying Rules 401, 402, and 403 in evaluating the defendant's challenge to testimony about her father's alleged gambling activity); *United States v. Cunningham*, 804 F.2d 58, 61-62 (6th Cir. 1986) (finding evidence that defendants' relative had been convicted of the same crime for which they were on trial, which presented a "clear danger of guilt by association," was irrelevant under Rule 401); *United States v. Peters*, 791 F.2d 1270, 1307-08 (7th Cir. 1986) (stating that the defendant challenged guilt by association evidence as unduly prejudicial under Rule 403 and analyzing the allegedly erroneous admission of that evidence under this rule); *United States v. Khan*, 787 F.2d 28, 34 (2d Cir. 1986)(recounting that the "defendant contends that the trial judge should have excluded the evidence under [Rule] 403 on the ground that its probative value was

substantially outweighed by the danger of unfair prejudice, because it 'subliminally appeal[ed] to guilt by association and potentially to prejudice against foreigners'" but ultimately concluding that the district court did not abuse its discretion in overruling the Rule 403 objection) (quoting defendant-appellant's brief); *United States v. Hernandez*, 780 F.2d 113, 118 (D.C. Cir. 1986) (holding that the challenged evidence violated Rule 403 because it was only a "slightly refined version of guilt by association," not legitimately admissible proof).

Rule 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." FED.R.EVID. 401. Rule 402 prohibits the admission of irrelevant evidence. See FED.R.EVID. 402. Rule 403 provides that relevant evidence nonetheless may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation or cumulative evidence." FED.R.EVID. 403. Accordingly, there are two

> arguments against guilt by association evidence: first, that it is not relevant as that term is defined in Rule 401 and hence is inadmissible under Rule 402, and second, that even if it is relevant, it is unduly prejudicial and excludable under Rule 403. Polasek's associates' convictions are simply irrelevant to her case.

Polasek, 162 F.3d at 887 n.2. Petitioner's case is no different.

The panel's suggestion that the United States elicited merely "brief, background information from Agent Slater" (Mem. Op. at 15) does not accurately reflect the record. The government's effort began during opening statement, continued with Agent Slater's lengthy testimony over 15 pages of the trial transcript, and concluded with the government's plea during summation that the jury should convict Adams because federal agents "worked extremely hard and convicted 20 people on public---19 people on public corruption charges. And Robert Adams happens to be right in the middle of it" (JA 880-81).

This was more than "brief, background information" as suggested by the panel. It was instead the drumbeat of the government's case and is patently inconsistent with the principles of justice articulated by the Supreme Court in *McGrath* and by the First, Second, Fifth, Sixth, Seventh, Eighth, and District of Columbia Circuits. In the words of the Supreme Court, such tactics are "odious" and are on par with suggesting that a jury should convict a

defendant because he has chosen to remain silent or declined to produce evidence. "[C]onstitutional errors that affect substantial rights of a party" require reversal. *Chapman v. California*, 386 U.S. 18, 23, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967) (Fifth Amendment right to remain silent).

The government's efforts in this case to convict Adams based upon guilt by association are quintessentially prosecutorial misconduct and violates Adam's right to a fair trial guaranteed by the Due Process clauses of the Fifth and Fourteenth Amendments. Remarkably, the same Fourth Circuit that found no error in Adams' conviction held in *U.S. v. Wilson*, 135 F.3d 291 (4th Cir. 1998), that

> a prosecutor's misconduct in closing argument "'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S. Ct. 2464, 2471, 91 L. Ed. 2d 144 (1986) (*quoting Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974)).

Id., 135 F.3d at 297. *See also*, *United States. v. Mitchell*, 1 F.3d 235, 240 (4th Cir. 1993), and *United States v. Adam*, 70 F.3d 776, 780 (4th Cir. 1995).

Several factors are relevant to the determination of prejudice, including:

> (1) the degree to which the prosecutor's remarks have a tendency to mislead the

> jury and to prejudice the accused; (2) whether the remarks were isolated or extensive; (3) absent the remarks, the strength of competent proof introduced to establish the guilt of the accused; and (4) whether the comments were deliberately placed before the jury to divert attention to extraneous matters. *Adam*, 70 F.3d at 780 (*quoting United States v. Harrison*, 716 F.2d 1050, 1052 (4th Cir. 1983)); *Mitchell*, 1 F.3d at 241-42 (*same*). We also consider (5) whether the prosecutor's remarks were invited by improper conduct of defense counsel, *see United States v. Young*, 470 U.S. 1, 12-13, 105 S. Ct. 1038, 1044-45, 84 L. Ed. 2d 1 (1985), and (6) whether curative instructions were given to the jury, *see Harrison*, 716 F.2d at 1053. These factors are examined in the context of the entire trial, and no one factor is dispositive.

Id. 135 F.3d at 299.

In this case the government's efforts at guilt by association began in opening statement and continued throughout the trial. The government cannot rely on a conspiracy or racketeering theory: Adams was never charged with racketeering or conspiracy, and the charges against Adams were severed because the charges against Adams were unrelated to charges against other persons (JA 16-

22).[4] *See also*, *Mitchell*, 1 F.3d at 240 (reversing conviction where prosecutor urged conviction because defendant's brother had also been convicted).

The evidence in question also is inadmissible under FRE 401, 402 and 403. See, *Polasek*, 162 F.3d at 885-86 n. 2 (5th Cir. 1998). First, under Rule 401 and 402, the fact that other persons engaged in criminal activity, were prosecuted and convicted is not relevant evidence; such evidence does not "hav[e] any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Moreover, such evidence does not have any probative value, and the likelihood that it will "[cause] unfair prejudice, confus[e] the issues, or [mislead] the jury" is substantial. FRE 403. The testimony and references improperly suggested to the jury Adams' guilt by association and violated the presumption of innocence.

After determining that the government's conduct was improper, the Court next determines whether the remarks "prejudicially affected the defendant's substantial rights so as to deprive [him] of a fair trial." *Wilson*, 135 F.3d at 297. The first question in this analysis is "the degree to which the prosecutor's remarks have a tendency to mislead the jury and to prejudice the accused." *Id.*, 135 F.3d at 299. Guilt by association is "one of the most odious institutions of history. ... Guilt under our system of government is personal." *McGrath*, 341 U.S. at 178.

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[4] The other persons were prosecuted in the district court in case no. 7:06cr00098.

Here, the degree to which the efforts of the United States tended to mislead the jury and prejudice the accused must be deemed significant because of the very nature of the statements and evidence presented at trial. Further, the trial court's admission of the "background" evidence and argument only served to validate the jury's reliance on this "background" information to convict Adams.

Next, the Court must ask "whether the remarks were isolated or extensive." *Wilson*, 135 F.3d at 299. As set forth above, the United States' efforts at guilt by association began during the government's opening statement; continued through the presentation of evidence; and were reinforced during closing argument.

Third, "absent the remarks, [what was] the strength of competent proof introduced to establish the guilt of the accused." *Id.*, 135 F.3d at 299. The evidence against Adams consisted of witnesses who were admitted perjurers, liars, jailhouse snitches and convicted felons. Perhaps more significant here is the fact that much of the evidence in the government's case-in-chief against Adams was intended specifically to impugn his character. This is important because Adams' good faith was a defense against the charge of making a false statement alleged in Count Five of the indictment (JA 897-98). As stated, the evidence against Adams was marginal at best, as shown by his acquittal on three of the five counts on which he was tried.

Fourth, the Court must determine "whether the comments were deliberately placed before the

jury to divert attention to extraneous matters." *Wilson*, 135 F.3d at 299. The government's extensive reference to the illegal acts and convictions of other persons compels a finding that the government purposely did so in an effort to persuade the jury that Adams must be guilty because of his association with other persons who had already been convicted of other crimes. *See Mitchell*, 1 F.3d at 242.

Mitchell provides additional support for the conclusion that that Adams was denied a fair trial. In *Mitchell* the defendant called his brother – an alleged co-conspirator who had already gone to trial and been convicted, to testify on his behalf. *Mitchell*, 1 F.3d at 238. The government attacked the credibility of the brother by arguing that the jury in the brother's trial did not believe his testimony, and that this jury should not believe his testimony either. *Id.*, 1 F.3d at 239. The Court found that the defendant was denied a fair trial[5] by the government's behavior, finding that "the clear thrust of the prosecution's argument was that the appellant's brother's conviction should be used as substantive evidence of the appellant's guilt. This is clearly not permissible." *Id.*, 1 F.3d at 240-41.

In this case where Adams' conviction on Count V turned upon the difficult factual determination of whether he *intentionally* made a false statement to federal agents, the United States grossly overcharged Adams (as stated, Count III was dismissed pre-trial; the jury found Adams not guilty

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[5] The Court found error and vacated the conviction under a plain error standard because the defendant had not objected at trial. *Mitchell*, 1 F.3d at 239.

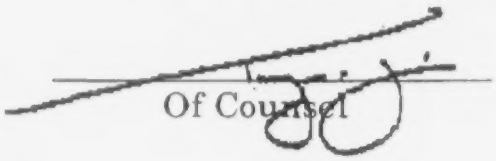
of Counts I, II and VI; and Count IV was dismissed by the Fourth Circuit); offered evidence that Adams had an extramarital affair (R. 68, at 12-13); offered hearsay testimony from a deceased drug dealer (R. 68, at 13-15); suggested that the jury should convicted Adams because 19 other persons had been convicted of other crimes; and told the jury in closing that the government's star witness "is going to the federal penitentiary" (*see* R. 59, at 12) (the informant never served a day in prison). Although the Fourth Circuit panel rejected Adams' claim of prosecutorial misconduct, such conduct is plainly inconsistent with federal jurisprudence and was designed and intended specifically to undermine Adams' credibility.

Adams respectfully submits that the Fourth Circuit should have reversed the judgment of the district court with respect to Count V and remanded the case for a new trial.

CONCLUSION

Adams' conviction was based upon the United States' argument and evidence that the jury should convict him because the United States had worked hard and convicted 19 other persons of public corruption charges. Due process requires that this Court grant this petition and ultimately reverse the judgment of the Fourth Circuit and enter judgment for Adams or remand the case for a new trial.

Respectfully submitted,

By 
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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

[ENTERED JUNE 29, 2009]

No. 08-4180

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ROBERT KEITH ADAMS,

Defendant - Appellant.

Appeal from the United States District Court for the Western District of Virginia, at Roanoke. James C. Turk, Senior District Judge. (7:06-cr-00112-jct-1)

Argued: May 15, 2009 Decided: June 29, 2009

Before MICHAEL, SHEDD, and AGEE, Circuit Judges.

Affirmed in part, vacated in part, and remanded for resentencing by unpublished per curiam opinion.

ARGUED: Terry Neill Grimes, GRIMES & WILLIAMS, P.C., Roanoke, Virginia, for Appellant. Jean Barrett Hudson, OFFICE OF THE UNITED STATES ATTORNEY, Charlottesville, Virginia, for

Appellee. **ON BRIEF:** Melvin E. Williams, GRIMES & WILLIAMS, P.C., Roanoke, Virginia, for Appellant. Julia C. Dudley, Acting United States Attorney, Roanoke, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Robert Keith Adams was convicted of obstruction of proceedings in an official investigation, in violation of 18 U.S.C. § 1505, and making a materially false statement, in violation of 18 U.S.C. § 1001(a)(2). Adams appeals, raising twelve separate arguments challenging the district court's resolution of pre- and post-trial motions, the admission of certain evidence, the sufficiency of the evidence, the propriety of certain jury instructions, and the fairness of his trial due to alleged prosecutorial misconduct.

The Government concedes that Adams' conviction for obstruction should be vacated, and contends that this concession makes most of Adams' remaining arguments moot. The Government further contends the evidence was sufficient to convict Adams on the material false statement charge, and that any errors that may have occurred regarding that charge were harmless.

For the reasons set forth below, we affirm Adams' conviction for making a false statement. However, because the Government concedes that Adams' conviction for obstruction should be vacated,

we vacate Adams' conviction for that count and remand for resentencing.

I.

Prior to his arrest, Adams was a Sergeant with the Henry County Sheriff's Department ("HCSD"). In March 2005, a joint-agency investigation revealed wide-spread corruption and criminal activity within the HCSD. As a result of the investigation, at least twenty individuals in the HCSD, including Adams, were prosecuted for federal crimes.

In a six-count indictment, Adams was charged with relieving, comforting and assisting a person who had committed an offense against the United States in order to hinder or prevent that person's apprehension, trial and punishment, in violation of 18 U.S.C. § 3 ("Count I"); concealing knowledge of the commission of a narcotics felony by performing acts in violation and contravention of his sworn duties as a law enforcement officer, in violation of 18 U.S.C. § 4 ("Count II"); obstruction of justice by impeding an official investigation, in violation of 18 U.S.C. § 1512(c)(2) ("Count III"); obstruction of justice by impeding an agency proceeding, in violation of 18 U.S.C. § 1505 ("Count IV"); and two counts of making false material statements to a government agent, in violation of 18 U.S.C. § 1001(a)(2) ("Count V" and "Count VI").

Prior to trial, the district court dismissed Count III. Adams was tried by a jury on the five remaining counts. He was acquitted on Counts I, II,

and VI, but convicted by the jury on Counts IV and V. The district court sentenced Adams to separate terms of imprisonment of 12 months and one day for each count, to run concurrently, and to a period of 24 months' supervised release on each count, also to run concurrently.

Adams noted a timely appeal, raising twelve issues of alleged error. Additional facts relating to each issue will be discussed in context.

II.

A.

Several of Adams' arguments challenge his conviction on Count IV, for obstruction of proceedings in an official investigation, in violation of 18 U.S.C. § 1505. As noted, the Government concedes "for purposes of this appeal that a criminal investigation by the [Drug Enforcement Agency] or [Federal Bureau of Investigation] is not a 'pending proceeding' within the scope of 18 U.S.C. § 1505, and requests that Adams' conviction on Count [IV] be vacated . . . ." (Appellee's Br. 15.) In light of the Government's concession, we will vacate Adams' conviction on Count IV. Furthermore, because of this disposition, we need not address Adams' remaining

arguments challenging his conviction on that charge.[1]

B.

Adams also challenges the sufficiency of the evidence to convict him on Count V. In assessing the sufficiency of the evidence, the Court determines whether the jury's verdict is sustained by "substantial evidence, taking the view most favorable to the Government, to support it." United States v. Pierce, 409 F.3d 228, 231 (4th Cir. 2005) (quoting Glasser v. United States, 315 U.S. 60, 80 (1942)) (internal quotation marks omitted). "[S]ubstantial evidence is evidence that a reasonable finder of fact could accept as adequate and sufficient to support a conclusion of a defendant's guilt beyond a reasonable doubt." United States v. Burgos, 94 F.3d 849, 862 (4th Cir. 1996) (en banc).

Count V charged Adams with making a false material statement to agents of the Federal Bureau of Investigation ("FBI"), in violation of 18 U.S.C. § 1001(a)(2). This statute prohibits an individual from "knowingly and willfully" making "any materially false, fictitious, or fraudulent statement or representation" "in any matter within the

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[1] In addition to raising several arguments directly challenging his conviction on Count IV, Adams contends that his convictions for Counts IV and V violated the Double Jeopardy Clause. Because we are vacating his conviction as to Count IV, this argument is also moot. See United States v. Bass, 310 F.3d 321, 323 (5th Cir. 2002) (holding Double Jeopardy argument is moot where the court had held that one of the convictions at issue must be vacated for other reasons); United States v. Otis, 127 F.3d 829, 835 (9th Cir. 1997) (same).

jurisdiction of the executive . . . branch of the Government." 18 U.S.C.A. § 1001(a)(2) (West 2000 & Supp. 2008). Adams asserts the Government failed to meet its burden of proving Adams "knowingly and willfully made a false statement" to the FBI Agents. (Appellant's Br. 44.)

The evidence adduced at trial showed that James Vaught, a former HCSD officer, eventually cooperated with investigators and agreed to wear a wire to record conversations with other members of the HCSD. The Government recorded a January 2006 conversation between Vaught and Adams, during which Vaught told Adams he was looking for known drug dealer Wilbert Brown in order to sell him a half-kilogram of cocaine.

On March 24, 2006, FBI Agents Stan Slater and Mark Austin (collectively "the Agents") interviewed Adams as part of their investigation. During that recorded interview, Adams twice told the Agents he had no idea why Vaught had been looking for Brown in January 2006. In light of these recordings, which were played for the jury, we conclude that sufficient evidence exists to support the guilty verdict as to Count V.

C.

Adams contends the district court erred in denying several pre-trial motions: a motion to suppress the March 24, 2006 statements to the FBI Agents, a motion to dismiss the indictment, a motion to order a bill of particulars, and a motion to order

separate trials of each count. We address each claim in turn.

Adams argues the district court should have suppressed all of the statements he made during the March 24, 2006 interview with the Agents because they promised him that any statements made during that interview would be kept confidential. As a consequence, Adams contends that using his statements to the Agents as the basis for Count V violated what effectively was a promise of immunity.[2] In reviewing the denial of a motion to suppress, this Court "reviews the district court's factual findings for clear error, and its legal conclusions de novo." United States v. Wilson, 484 F.3d 267, 280 (4th Cir. 2007). Adams' argument fails because the transcript of the March 24, 2006 interview shows that the Agents did not promise Adams immunity from prosecution. The context of their statements shows that they would not report anything Adams told the Agents to Adams' supervisors in the HCSD. The Agents clearly and repeatedly told Adams that anything he told them could be used to prosecute him. Furthermore, the transcript of the March 24, 2006 interview shows that Adams first told the Agents that he did not know why Vaught wanted to find Brown prior to the Agents' purported promise of confidentiality. Although Adams subsequently reiterated his

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[2] The Government also relied on statements Adams made in the March 2006 interview as part of its proof regarding Count VI. However, because Adams was acquitted of that charge, his argument related to Count VI is moot because acquittal afforded him a complete remedy. See United States v. Burns, 990 F.2d 1426, 1439 (4th Cir. 1993).

statement, Adams' initial statement alone was sufficient to convict Adams of making a material false statement to the Agents, as charged in Count V. Accordingly, the district court did not err in denying Adams' motion to suppress.

Adams next contends the district court erred by failing to dismiss the indictment because the indictment lacked specificity with regard to Counts I, II, and IV. Adams' argument is unavailing as to Counts I and II because he was acquitted of those counts. That acquittal afforded him a complete remedy to any perceived error. See Burns, 990 F.2d at 1439. Similarly, no error is cognizable as to Count IV because we are vacating Adams' conviction as to that count, so this contention is now moot. See Consolidation Coal Co. v. Local 1643, 48 F.3d 125, 130 n.6 (4th Cir. 1995).

Adams also asserts the district court abused its discretion by failing to order a bill of particulars. See United States v. MacDougall, 790 F.2d 1135, 1153 (4th Cir. 1986) (review is for abuse of discretion). Adams maintains that the indictment's allegations were too vague for him to adequately prepare for trial, and that a bill of particulars was necessary to pinpoint the location of any information in the voluminous evidence that the Government planned to use against him.

"[T]he purpose of a bill of particulars is to enable a defendant to obtain sufficient information on the nature of the charge against him so that he may prepare for trial, minimize the danger of surprise at trial, and enable him to plead his

acquittal or conviction in bar of another prosecution for the same offense." United States v. Schembari, 484 F.2d 931, 934-35 (4th Cir. 1973). However, the purpose of a bill of particulars is "fully satisfied" when the Government turns over its entire file to the defendant. Id. at 935.

Here, the Government maintained an open file policy, informed Adams that all the evidence against him would be found in transcripts of Vaught's recordings, and provided electronically-searchable transcripts of those recordings. Moreover, Adams' arguments during the motion to dismiss the indictment show that Adams knew specifically what the Government's evidence was well before trial. On this record, it is clear that the purpose of a bill of particulars was fulfilled, and the district court did not abuse its discretion in refusing to grant Adams' motion.

Adams contends the court should have ordered separate trials on the various counts of the indictment. Specifically, he asserts there should have been separate trials on Counts I and II, Count V, and Count VI because although Counts I and II related to each other, the other counts were not properly joined and a single trial was prejudicial. "Whether offenses in an indictment are improperly joined under [Fed. R. Crim. P. 8(a)] is a question of law reviewed de novo." United States v. Cardwell, 433 F.3d 378, 384-85 (4th Cir. 2005). Whether the district court erred in denying a Rule 14 motion to sever properly-joined charges is reviewed for abuse of discretion. Id. at 385. The principles governing joinder are clear:

> Under Federal Rule of Criminal Procedure 8(a), a single indictment may charge a defendant with multiple counts if the offenses charged are of the same or similar character, or are based on the same act or transaction, or are connected with or constitute parts of a common scheme or plan. Joinder of related charges is broadly permitted to avoid needless duplication of judicial proceedings, particularly where evidence of one charge would be admissible to prove another charge. Nonetheless, Rule 14(a) provides that [i]f the joinder of offenses . . . appears to prejudice a defendant or the government, the court may order separate trials of counts. The party seeking severance bears the burden of demonstrating a strong showing of prejudice, and we are mindful that the district court's denial of a motion to sever should be left undisturbed, absent a showing of clear prejudice or abuse of discretion.

United States v. Branch, 537 F.3d 328, 341 (4th Cir. 2008) (internal quotation marks and citations omitted) (alterations in original).

We conclude the charges were properly joined in a single indictment and the district court did not abuse its discretion in permitting a single trial of all the charges against Adams. The charges that went to trial all stemmed from Adams' purported

knowledge of criminal conduct at HCSD, his efforts to conceal that activity, and his subsequent failure to be forthcoming to FBI Agents during their investigation into HCSD. Accordingly, the charges were of a similar character and were sufficiently connected to be joined in the same indictment.

Having determined the charges were properly joined, we next consider whether the district court abused its discretion by failing to sever the charges. It is readily apparent from the record that "[t]rying the [charges] separately would have led to significant inconvenience for the government and its witnesses, and required needless duplication of judicial resources in light of the legal, factual, and logistical relationship between the charges." See United States v. Mir, 525 F.3d 351, 357 (4th Cir. 2008). As just two examples, Agent Slater testified as to key evidence related to all of the charges against Adams, and Vaught's testimony related to Counts I, II, IV, and V. In light of the district court's broad authority to permit a single trial of properly-joined charges, we find no error in the exercise of its discretion doing so.

D.

Adams claims the admission of two pieces of evidence constituted prejudicial error. First, he asserts the admission of his testimony on cross-examination that he had an extramarital affair was irrelevant and highly prejudicial. Second, he asserts the testimony of Wynona Dudley as to statements made by her deceased boyfriend, Calvin Rayfield

Moore, were inadmissible under the Federal Rules of Evidence governing admission of hearsay.

Adams filed a motion in limine to exclude any evidence that he had an extramarital affair. The district court deferred a decision on that motion to "see how the evidence develop[ed]" at trial. (J.A. 210.) Although the Government asked Adams during cross-examination whether he had engaged in extramarital affairs, Adams did not object. Accordingly, this Court reviews the admission of that evidence for plain error. United States v. Ellis, 121 F.3d 908, 918 (4th Cir. 1997) (holding review is limited to plain error when a district court defers ruling on a motion in limine regarding certain evidence and the defendant fails to object when that evidence is subsequently introduced during trial).

> Under the plain error standard of review, to establish our authority to notice an error not preserved by a timely objection, a defendant must demonstrate (1) that an error occurred, (2) that the error was plain, and (3) that it affected his substantial rights. If the defendant satisfied these threshold requirements, correction of the error is within our discretion, which is "appropriately exercised only when failure to do so would result in a miscarriage of justice, such as when the defendant is actually innocent or the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings."

United States v. Farrior, 535 F.3d 210, 222 (4th Cir. 2008) (quoting United States v. Promise, 255 F.3d 150, 161 (4th Cir. 2001) (en banc)). We conclude the admission of this evidence cannot be said to have affected Adams' substantial rights or the fairness of the trial in light of the overwhelming evidence of Adams' guilt as to Count V.

More troubling was the admission, over Adams' objection, of Dudley's hearsay testimony as to statements her deceased boyfriend, Moore, purportedly made to her. Dudley testified Moore told her that Adams accepted payoffs from him in order for Moore to continue dealing drugs. Adams asserts the admission of this hearsay testimony constituted prejudicial error because it was not admissible under any of the exceptions regarding the admissibility of hearsay evidence. Adams further contends that even though the testimony directly related to Counts IV and VI, its admission deprived Adams of a fair trial on the remaining charges against him, including Count V.

When the issue has been properly preserved, decisions regarding the admission of evidence are reviewed for abuse of discretion. United States v. Lancaster, 96 F.3d 734, 744 (4th Cir. 1996) (en banc). Evidentiary rulings are also subject to review for harmless error under Fed. R. Crim. P. 52(a) and will be found harmless if the reviewing court can conclude, "without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error." United States v. Brooks, 111 F.3d 365, 371 (4th Cir. 1997) (internal quotations omitted.)

Even assuming the district court erred in admitting Dudley's hearsay testimony, we conclude its admission was harmless. "In order for an error to have a substantial and injurious effect or influence, it must have affected the verdict . . . . [A]n error is harmless when the error did not substantially sway or substantially influence" the jury's decision. United States v. Iskander, 407 F.3d 232, 240 (4th Cir. 2005) (quoting Cooper v. Taylor, 103 F.3d 366, 370 (4th Cir. 1996)). Any error in the admission of Dudley's testimony was harmless because the jury acquitted Adams on all but two counts, we are vacating Adams' conviction as to Count IV on other grounds, and – as detailed above in section III.B. – the evidence as to Adams' guilt on Count V is completely independent of Dudley's testimony and plainly sufficient to support his conviction. Accordingly, the admission of Dudley's testimony cannot be said to have "substantially influence[d]" the jury's decision, and any error in the admission of that testimony was harmless.

E.

Adams asserts he was denied his constitutional right to a fair trial because the Government improperly argued during its opening and closing, as well as through witness questioning, that Adams should be convicted because he associated with individuals in the HCSD who had been convicted for their criminal conduct.

We have reviewed the record, including the portions of the Government's opening and closing arguments and its questioning of witnesses that

Adams challenges as improper. We conclude the Government did not cross the line into impermissible assertions of guilt by association when it elicited brief, background information from Agent Slater as to his investigation of the HCSD and its witnesses regarding their participation in corrupt acts with which Adams was not charged.

Unlike the cases relied upon by Adams, his charged conduct – assisting in covering up criminal activity, obstruction of justice, and providing false statements during a government investigation – were linked to a broader scheme of criminal activity in the police unit and the federal investigation into that conduct. Consequently, evidence of Vaught's criminal conduct and Adams' knowledge of and assistance thereto were necessary aspects of proving the charges against Adams. In addition, the Agents' investigation of HCSD provided important information into Adams' conduct, including the recorded conversation between Vaught and Adams and the context of the March 24, 2006 interview between the Agents and Adams. Similarly, the Government's opening and closing arguments did not suggest the jury should convict Adams based on others' criminal conduct, but rather based on Adams' own conduct in the midst of corruption occurring throughout the HCSD. Because the Government's arguments targeted Adams' own behavior in assisting or covering up others' criminal conduct, and his false statements to the FBI Agents during their investigation of the HCSD, Adams was not denied a fair trial.

F.

Adams contends the jury instructions related to Count V "confused the jury as to whether it was required to unanimously agree on the specific false statements made by Adams" and therefore had the potential to deny Adams a fair trial by allowing for conviction without the requisite unanimous agreement. (Appellant's Br. 44-45.) When a party challenges jury instructions as creating jury confusion, the Court must determine "whether there is a reasonable likelihood that the jury has applied the challenged instructions in a way that violates the Constitution." Jones v. United States, 527 U.S. 373, 390 (1999) (internal quotation marks omitted). Here, the district court instructed the jury: jury has applied the challenged instructions in a way that violates the Constitution." Jones v. United States

> Counts Five and Six of the indictment, which charge the defendant with the knowing and willful submission of false, fictitious, or fraudulent statements alleges a number of false or fraudulent statements. The government is not required to prove that all of these statements that are alleged in Counts Five and Six of the indictment as false are in fact false.
>
> Each juror must agree, however, with each of the other jurors that the same statement or representation alleged in Count Five and Count Six respectively to be false, fictitious, or

> fraudulent is in fact false, fictitious, or fraudulent.
>
> The jury need not unanimously agree on each such statement alleged, but, in order to convict, must unanimously agree upon at least one such statement as false, fictitious, or fraudulent when knowingly made or used by the defendant.
>
> Unless the government has proven the same false or fraudulent statement to each of you beyond a reasonable doubt, you must acquit the defendant of the charge in either Count Five or Six of the indictment.

(J.A. 896-97.) We do not find that these instructions created a reasonable likelihood that the jury applied them in a way that violates the Constitution. Jurors are presumed to follow proper jury instructions. See United States v. Williams, 461 F.3d 441, 451 (4th Cir. 2006). The instructions clearly state that the jury must "unanimous agree upon at least one" statement the Government alleged was "false, fictitious, or fraudulent when made or used by" Adams. Thus, Adams' jury instruction argument is without merit.

G.

Lastly, Adams asserts numerous instances of prosecutorial misconduct, which he contends prevented him from receiving a fair trial. We have

reviewed each claim and find those claims either lack merit or fail to allege conduct that "so infected the trial with unfairness as to make the resulting conviction a denial of due process." See United States v. Scheetz, 293 F.3d 175, 185 (4th Cir. 2002) (internal quotation marks omitted).[3]

Only one of Adams' assertions warrants any discussion. Adams contends the Government's closing argument improperly attacked defense counsel's integrity, and thereby prejudiced Adams' ability to receive a fair trial. In analyzing a "due process claim premised on unfair prosecutorial conduct," the Court examines several factors,

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[3] Adams' final assertion of error is the district court's failure to grant his motion for judgment of acquittal or, in the alternative, for a new trial. Adams does not raise any new arguments related to this issue, but relies on the reasons set forth in his individual assertions of error.

The Court reviews de novo the district court's denial of a Fed. R. Crim. P. 29 motion for judgment of acquittal. United States v. Reid, 523 F.3d 310, 317 (4th Cir.), cert. denied, 129 S. Ct. 663 (2008). In conducting this review, "the verdict of the jury must be sustained if there is substantial evidence, taking the view most favorable to the government, to support it." Glasser v. United States, 315 U.S. 60, 80 (1942). As noted above, "substantial evidence" is "evidence that a reasonable finder of fact could accept as adequate and sufficient to support a conclusion of a defendant's guilt beyond a reasonable doubt." Burgos, 94 F.3d at 862. We review a district court's denial of a Rule 33 motion for a new trial for abuse of discretion. United States v. Smith, 451 F.3d 209, 216-17 (4th Cir. 2006).

For the reasons set forth above, substantial evidence supported Adams' conviction on Count V. Accordingly, the district court did not err in denying Adams' motion for judgment of acquittal and it did not abuse its discretion in denying his motion for a new trial.

including "the nature of the prosecutorial misconduct, the extent of the improper conduct, the issuance of curative instructions from the court, any defense conduct inviting the improper prosecutorial response, and the weight of the evidence." Humphries v. Ozmint, 397 F.3d 206, 218 (4th Cir. 2005) (en banc) (internal citations omitted).

Adams points to comments made by the Government during rebuttal, and we conclude that they did not unfairly prejudice the defendant in light of the "invited response" doctrine. As the Supreme Court has stated:

> The [prosecutor's] remarks must be examined within the context of the trial. . . . In this context, defense counsel's conduct, as well as the nature of the prosecutor's response is relevant. Indeed most Courts of Appeals . . . have refused to reverse convictions where prosecutors have responded reasonably in closing argument to defense counsel's attacks, thus rendering it unlikely that the jury was led astray.
>
> . . . . [T]he issue is not the prosecutor's license to make otherwise improper remarks, but whether the prosecutor's 'invited response,' taken in context, unfairly prejudiced the defendant.
>
> In order to make an appropriate assessment, the reviewing court must

> not only weight the impact of the prosecutor's remarks, but must also take into account defense counsel's opening salvo. Thus the import of the evaluation has been that if the prosecutor's remarks were "invited," and did no more than respond substantially in order to "right the scale," such comments would not warrant reversing a conviction.

United States v. Young, 470 U.S. 1, 12-13 (1985).

Here, defense counsel's closing argument called into question the integrity of the FBI Agents, the Government's witnesses, and even the prosecutors themselves. (Supp. J.A. 1167-69, 1172, 1177.) Accordingly, the Government's rebuttal statements responded to defense counsel's contentions and did not unfairly prejudice Adams.

III.

For the aforementioned reasons, we affirm the judgment of the district court as to Adams' conviction on Count Five (making a material false statement), and vacate the judgment as to Count Four (obstruction of justice). We remand for resentencing on Count Five.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED FOR RESENTENCING

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

[ENTERED JUNE 29, 2009]

No. 08-4180 (7:06-cr-00112-jct-1)

UNITED STATES OF AMERICA,

Plaintiff – Appellee

v.

ROBERT KETIH ADAMS,

Defendant – Appellant

J U D G M E N T

In accordance with the decision of this Court, the judgment of the District Court is affirmed in part and vacated in part. This case is remanded to the District Court for further proceedings consistent with the Court's decision.

This judgment shall take effect upon issuance of this Court's mandate in accordance with Fed. R. App. P. 41.

/s/ Patricia S. Connor

UNITED STATES DISTRICT COURT
Western District of Virginia

[ENTERED JANUARY 31, 2008]

UNITED STATES OF AMERICA

V.

ROBERT KEITH ADAMS

JUDGMENT IN A CRIMINAL CASE

Case Number: DVAW706CR000112-001

Case Number:

USM Number: 12440-084

Terry N. Grimes and Melvin E. Williams
Defendant's Attorney

THE DEFENDANT:

[ ] pleaded guilty to count(s) _____

[ ] pleaded nolo contendere to count(s) _____ which was accepted by the court.

[X] was found guilty on count(s) four and five _____ after a plea of not guilty,

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense
18 USC § 1505	Obstruction of Proceedings in an Official Investigation
18 USC § 1001(a)(2)	False Statement to a Government Agent

Offense Ended	Count
10/2006	4
3/24/2006	5

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[X] The defendant has been found not guilty on count(s) one, two, and six

[ ] Count(s) _____ [ ] is [ ] are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and Untied States attorney of material changes in economic circumstances.

January 28, 2008
Date of Imposition of Judgment

/s/
Signature of Judge

James C. Turk, Senior United States District Judge
Name and Title of Judge

January 31, 2008
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

12 months and 1 day consisting of 12 months and 1 day on each of Counts 4 and 5 to run concurrently.

[X] The court makes the following recommendations to the Bureau of Prisons:

The court recommends placement at the camp facility at Butner, NC.

[ ] The defendant is remanded to the custody of the United States Marshal.

[ ] The defendant shall surrender to the United States Marshal for this district:

[ ] at _____ [ ] a.m. [ ] p.m. on _____
[ ] as notified by the United States Marshal.

[X] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

[ ]before ____ on _____
[X] as notified by the United States Marshal.
[ ] as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
a _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHALL

By _____
DEPUTY UNITED STATES MARSHALL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of:

24 months on each of Counts 4 and 5, which terms are to run concurrently.

MANDATORY CONDITIONS OF SUPERVISION

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

[X] The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

[X] The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)

[X] The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

[ ] The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

[ ] The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet on this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use,

distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such

notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

1) The defendant shall reside in a residence free of firearms, ammunition, destructive devices and dangerous weapons.

2) The defendant shall submit to warrantless search and seizure of person and property as directed by the probation officer, to determine whether the defendant is in possession of firearms or destructive devices.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine
TOTALS	$200.00	$1,000.00

Restitution
$

[ ] The determination of restitution is deferred until ----. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

[ ] The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
TOTALS	$0.00	$0.00	

[ ] Restitution amount ordered pursuant to plea agreement $_____

[ ] The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

[ ] The court determined that the defendant does not have the ability to pay interest and it is ordered that:

[ ] the interest requirement is waived for the [ ] fine [ ] restitution.

[ ] the interest requirement for the [ ] fine [ ] restitution is modified as follows:

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 13, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, the total criminal monetary penalties are due immediately and payable as follows:

A [X] Lump sum payment of $200.00 immediately, balance payable

[ ] not later than _____, or
[X] in accordance [ ] C, [ ] D, [ ] E, [ ] For, [X] G below); or

B [ ] Payment to begin immediately (may be combined with [ ] C, [ ] D, [ ] F, or [ ] G below); or

C [ ] Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $_____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D [ ] Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $_____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E [ ] Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F [ ] During the term of imprisonment, payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $___ ,or __% of the defendant's income, whichever is greater, to commence _____ (e.g., 30 or 60 days) after the date of this judgment; AND payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $_____ during the term of supervised release, to commence _____ (e.g., 30 or 60 days) after release from imprisonment.

G [X] Special instructions regarding the payment of criminal monetary penalties:

Balance payable within 90 days of release from incarceration.

Any installment schedule shall not preclude enforcement of the restitution or fine order by the United States under 18 U.S.C. §§ 3613 and 3664(m).

Any installment schedule is subject to adjustment by the court at any time during the period of imprisonment or supervision, and the defendant shall notify the probation officer and the U.S. Attorney of any change in the defendant's economic

circumstances that may affect the defendant's ability to pay.

All criminal monetary penalties shall be made payable to the Clerk, U.S. District Court, P.O. Box 1234, Roanoke, Virginia 24006, for disbursement.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

[ ] Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

[ ] The defendant shall pay the cost of prosecution.

[ ] The defendant shall pay the following court cost(s):

[ ] The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

[ENTERED AUGUST 4, 2009]

No. 08-4180
(7:06-cr-00112-jct-1)

UNITED STATES OF AMERICA,
Plaintiff – Appellee

v.

ROBERT KEITH ADAMS,
Defendant – Appellant

O R D E R

The Court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Michael, Judge Shedd and Judge Agee.

For the Court

/s/ Patricia S. Connor, Clerk